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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198483
Party	Plaintiff PsyBar LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PsyBar, LLC,

Opposition No.: 91198483

Opposer,

Serial No.: 85095429

v.

David Mahony, PhD.,

**SECOND AFFIDAVIT OF
DAVID C. FISHER**

Applicant.

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

I, David C. Fisher, having been duly sworn upon oath, deposes and says:

1. I am an owner and the Chairman of the Board of PsyBar, LLC, the Opposer in the above-captioned matter and have personal knowledge of all matters contained in my Affidavit. With respect to my or PsyBar's presence in the field of forensic psychology, not only is PsyBar likely the most well known industry leader in its field, I have personally received a presidential citation by the past President of the American Psychological Association. The presidential citation reads, in part, "In recognition of his creative development of innovative practice strategies to enhance forensic evaluations ... His protocols have had a national impact with more than 1200 psychologists and psychiatrists trained to use them in a variety of settings ... As the founder of PsyBar, Dr. Fisher has been a leader in the application of psychology for the benefit of the businesses, insurance companies, occupational health professionals, and unions across the United States"
2. Applicant states on pages 2 and 3 of his response in reference to PsyBar, "Their services do not involve evaluations for patients seeking bariatric surgery and entities that use their services are not the same ones that use the PSYBARI test."

That is false. PsyBar conducts many forensic evaluations on medical patients who are candidates for, or more commonly have completed, many types of medical procedures, occasionally including bariatric surgery. For example, an insurance company, attorney, employee assistance program or employer sends claimants or employees to PsyBar to oversee a psychological assessment. In the most frequent example, they refer the claimant or employee to PsyBar to

determine whether somebody is an appropriate candidate for a medical procedure. Bariatric surgery and the implantation of spinal pain control devices are examples of medical procedures. It is PsyBar's task to oversee the assessment, including helping to select the correct objective psychological tests such as the PsyBari. Members of PsyBar's doctor panel then write reports summarizing their findings, including their own psychological test results and the results of previous psychologists. If the PsyBari test had been given *by any psychologist*, this would therefore mean that a PsyBar doctor would discuss the PsyBari test, and use PsyBar's name, in the very same forensic report.

Another example would be when PsyBar would assist insurers, attorneys, employee assistance programs or employers by simply reviewing the medical records of a patient who has previously taken the PsyBari test. In this case, even though PsyBar's doctor would not personally administer the PsyBari test, it would be discussed in the report going to PsyBar's lay client. Again, the PsyBari test, and PsyBar, would be discussed in the same forensic document. We anticipate this will be a common occurrence once the PsyBar test emerges from its current research stage, and becomes widely adopted by hundreds of psychologists nationwide.

Another example would be a situation where a PsyBar doctor is asked to consult in a matter regarding professional misconduct or malpractice. In this situation a PsyBar doctor might be asked to review past test results, critique the adequacy of the test itself and its administration, and offer an opinion about the adequacy of the test or the competence of the psychologist who gave that test. If the PsyBari were the test in question, PsyBar would be responsible for issuing a critique of the test, within a report issued by PsyBar. Both in this initial report, and during subsequent jury testimony, there is great potential for confusion, often in a public forum.

3. On page 3 of Applicants response he states, "The Opposer has never offered services related to weight loss surgery or obesity and they do not conduct scientific research or create psychological tests. As such, the Opposer's repeat claims of "overlap," false suggestion of connection," the "likelihood of confusion of the two marks by relevant consumers," the "misleading nature of Applicant's mark" and the "likely dilution" of the two services are false."

Applicant is wrong and has no foundation to opine on what PsyBar does or does not do. PsyBar's doctor panel conducts many evaluations on obese patients who are involved in litigation or disputes with their employers. Sometimes these evaluations directly address obesity issues, and sometimes obesity is a tangential matter. However, in all of these cases medical records are reviewed and administered, and almost without exception summarized in reports sent to PsyBar clients. If the PsyBari test had been given by anyone, even a previous psychologist, it would almost certainly confuse PsyBar's lay

clients when mentioned in a PsyBar report.

4. On page 15 of his response, Applicant states, “The Applicant’s PSYBARI test is not used in the “forensic and litigation industry” so confusing the two would not be possible.”

To our knowledge, the PsyBari test has likely not been administered, to date, in a forensic evaluation. This is because so far it is a research instrument, available only to a very limited number of research psychologists. It likely does not yet have the scientific support behind it to justify using it in a forensic venue. However, when it becomes commonly accepted, this will change, and it will be used in forensics. This is because forensic psychologists are often called upon to determine if someone is psychologically a good candidate for a medical procedure, such as bariatric surgery or a spinal implantation device for pain control. In this venue, pre-surgical bariatric evaluations are forensic evaluations. Further, even in circumstances where the PsyBari is not administered in a forensic evaluation, it will certainly be reviewed in the “medical records” sections of PsyBar (and PsyBar competitors) forensic evaluations, thus causing confusion.

5. On page 4 of his response, Applicant opines “Consumers of the Applicant’s PSYBARI test and the Opposer’s PsyBar “network” are not the same entities. The consumers of the Applicants PSYBARI test are bariatric psychologists that evaluate obese patients seeking bariatric surgery. The consumers of the Opposer’s Psybar “network” are “attorneys, employee assistance professionals, employers, insurance companies, mediators, occupational health professionals, safety experts and unions,” (B) not bariatric psychologists. The Opposer’s consumers are seeking services such as diagnostic verification, not evaluations of obese individuals seeking bariatric surgery.”

That is false. PsyBar’s customers again include insurers, attorneys, employee assistance programs, employers, occupational health professionals, safety experts and unions. Each of these customers make many decisions based on the results of psychological testing performed by psychologists. They come to PsyBar to administer psychological tests or help interpret the results of previously administered psychological tests such as the PsyBari. These entities request, pay for tests, and read the interpretations of many psychological tests. As such, they are test consumers.

6. On page 14 of his response Applicant states, “.....they offered no evidence in discovery that they even evaluate sexual abuse/attack.”

PsyBar has evaluated many hundreds, perhaps thousands, of people who have been sexually abused and attacked. Our expertise in this area is well documented in PsyBar’s public presentations, some of which are available on our website and other materials previously disclosed. When the PsyBari test comes into general use, and is out of the research stage, it may be reviewed in

many PsyBar forensic reports covering sexual abuse as described above.

7. On pages 14 and 15 of his response, Applicant opines “In the Opposer’s affidavit (#18) the Opposer ingeniously attempts to confuse the reader on the issue of consumers of the two services being the same. “Employers and Employee Assistance Programs consistently rely on the results of objective psychological tests such as the PSYBARI to aide them in making employment-related decisions.” This again, is a clear attempt to mislead the reader. The PSYBARI test has never and will never be used by employers or employee assistance programs.”

That is false. First, many employee assistance programs conduct, request, or oversee, psychological evaluations. Thus, they are future consumers of the PsyBari. When the PsyBari emerges from the research stage, and becomes widespread, their psychologists will at adopt it in some assessments for bariatric surgery candidates. Further, employers and employee assistance programs commonly rely on the results of previous psychological evaluations to make employment (and in the case of EAPs) treatment decisions. When they read reports conducted by other psychologists who administer the PsyBari confusion will occur.

8. PsyBar’s panel members, as well as PsyBar’s principal psychologists, have collectively published many thousands of scientific papers. Under the name “PsyBar,” psychologists have presented scientific information to thousands of lay consumers as well as psychologists and psychiatrists.
9. Insurers refer to PsyBar for many reasons other than just determining psychological impairment. They also, for example, refer to PsyBar to help determine the necessity of surgical procedures, patient’s potential reactions to surgical procedures, reactions to sexual abuse, causation, and many other issues. Many of these issues obviously overlap with the PsyBari test.

FURTHER YOUR AFFIANT SAYS NOT.

Date: July 18, 2012

s/ David C. Fisher
David C. Fisher, PhD, LP, ABPP

Subscribed and sworn to before me this
18th day of July, 2012.

s/ Nichole L. Bowen
Notary Public

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